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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-986

BERNARD J. COLLINS and MARIAN COLLINS,
Petitioners,

vs.

THE RIDGE TOOL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Your Petitioners, Bernard J. Collins and Marian Collins, pray that a Writ of Certiorari issue to review the Judgment of the Circuit Court of Appeals entered on September 15, 1975, which reversed a jury verdict and judgment in favor of the plaintiffs entered in the United States District Court for the Western District of Wisconsin on February 19, 1972.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Wisconsin sustaining the jury verdict in favor of plaintiffs dated January 26, 1973, is not reported but is annexed as Appendix A.

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The Opinion of the Seventh Circuit Court of Appeals is reported in 520 F. 2nd 591 (1975) without reference to the pendency or disposition of a Petition for Rehearing In Banc and is annexed as Appendix B.

On Petition for Rehearing In Banc, the Court of Appeals denied rehearing on October 14, 1975 by a vote of 7 to 3 without opinion. The Order Denying Rehearing is annexed as Appendix D.

JURISDICTION

The Opinion of the Court of Appeals was entered on August 13, 1975. A timely Petition for Rehearing In Banc was filed, which was denied by a vote of 7 to 3 without opinion. This Court has jurisdiction under 28 U.S.C., Section 1245 (1).

QUESTIONS PRESENTED

1. Whether an intra-circuit conflict was created by the divided decision (2-1) in this case with prior decisions of the same Court of Appeals construing Wisconsin negligence and comparative negligence law. If there was such a conflict created, did the 7-3 vote on Petition for Rehearing En Banc, without opinion, fail to resolve the conflict, contrary to prior decision of the Supreme Court?

2. Did the divided-decision of the Court of Appeals misapply and conflict with applicable Wisconsin negligence and comparative negligence law and applicable Wisconsin and federal law as to sufficiency of the evidence to support jury findings?

3. Whether a Court of Appeals may redetermine questions of fact determined by a properly instructed jury, in the face of

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conflicting credible evidence, and absent any error by the trial court, without depriving litigant-petitioners of their Seventh Amendment rights to a jury trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII, Constitution of the United States, provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Wisconsin Comparative Negligence statute created in 1931 is also involved, and at the time of the accident in question, it was section 895.045 Wis.Stats., reading as follows:

> "895.045 *Contributory Negligence; when bars recovery.* Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

STATEMENT OF THE CASE

Petitioner, Bernard Collins, was injured on November 28, 1967, while using a pipe threading machine manufactured by respondent, when his jacket became entangled in a rotating pipe at the front of the machine where the pipe protruded. As the

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result of the injuries, his left arm was ultimately amputated. Petitioner, Marian Collins, is his wife.

The machine in question had a power switch located on the side of the machine, recessed and under a housing, towards the rear. Collins was not injured until about 10 seconds after he first became entangled and after the machine tipped over, during which time he could not reach the power-switch. There was evidence that if there had been a top or near top mounted switch, or a foot switch, he could have cut off the power and avoided injury. Experts testified that the machine was unreasonably dangerous as to design because of the location of the power-switch, that top or near-top mounted switches were feasible and were used by respondent's major competitors, and a foot-switch was feasible. Substantial expert testimony was presented at the trial by both parties as to whether the machine was or was not unreasonably dangerous and the negligence of the manufacturer with respect to warnings and instructions.

Petitioners commenced an action in the United States District Court for the Western District of Wisconsin under Wisconsin products liability law, claiming that the manufacturer was negligent because the machine was unreasonably dangerous as to design, failure to warn, and inadequate instructions.

On February 19, 1972, a unanimous 12 man jury returned a verdict in favor of plaintiffs for damages in the total sum of $247,737.75. The jury found defendant-manufacturer causally negligent and allocated 65% of the total negligence to it. The jury found Bernard Collins causally negligent and allocated 35% to him. Defendant's motions for judgment n.o.v. and for a new trial were denied by the trial court by an Opinion and Order dated January 26, 1973 (App. A), stating that the jury's findings were not against the weight of the evidence. (App. A, A-2).

In accordance with Wisconsin Comparative Negligence Law, the District Court entered judgment in favor of plaintiffs for $161,029.54.

Defendant made timely appeal to the Seventh Circuit Court of Appeals, and the case was argued in February, 1974. In a three-judge panel decision dated August 13, 1975, Indiana District Judge Grant, and Circuit Judge Pell, appointed from Indiana, weighed the conflicting testimony and concluded that defendant's product was safe. Senior Illinois District Judge William Campbell surveyed the conflicting evidence, and, in a strong dissent, concluded that the verdict should be affirmed.

Plaintiff made timely Petition for Rehearing In Banc, which was denied by a vote of 7 to 3 on October 14, 1975 without opinion.

Petitioners herein seek review of the reversal by the Seventh Circuit Court of Appeals of the Judgment in favor of plaintiffs.

REASONS FOR GRANTING THE WRIT

I. The Majority Decision Herein (2-1, Judges Grant, Pell, with Campbell Dissenting) Created an Intra-Circuit Conflict With Prior Decisions of the Seventh Circuit Court of Appeals in McPhee v. Corinth Machinery Co. (Judges Hastings, Fairchild and Campbell; See App. E and F), and Sievers v. Keebler Company (Judges Fairchild, Sprecher, and Reynolds; See App. G and H) Construing Wisconsin Negligence and Comparative Negligence Law in Products Liability Cases. The Intra-Circuit Conflict Was Not Resolved.

1. If an intra-circuit conflict was created, as will be shown, the Supreme Court has directed that the Court of Appeals should resolve the conflict. *Wisniewski v. U.S.*, 353 U.S. 901 (1957). Justice Harlan stated his view that such intramural conflicts should be avoided through later panels customarily deferring to decisions of prior panels. "*Manning the Dikes,*" 18th Annual Cardozo Lecture, p. 19.

On Petition for Rehearing in Banc herein, decided October 14, 1975, Chief Judge Fairchild, then Judge John Paul Stevens, and Judge William Campbell, who wrote the strong dissenting opinion in this case, voted for rehearing. It is a reasonable conclusion that these votes for rehearing implicitly indicated that the divided decision of the three-judge panel either (1) created an intra-circuit conflict with prior decisions of the *same* Court construing Wisconsin law, or (2) that the evidence was *not* such that the Court could say—as the majority did—*as a matter of law* that defendant-manufacturer was *not* negligent.

2. There was an intra-circuit conflict created by the majority decision in this case with prior decisions of the same Court construing Wisconsin law.

Uniquely, Wisconsin has had comparative negligence since 1931, while no other State in the Seventh Circuit has it (Laws, Wis. 1931, c. 242).

In *Collins v. Ridge Tool Co.*, as in *McPhee v. Corinth Machinery Co.* and *Sievers v. Keebler Company*—all arising in the U.S. District Court for the Western District of Wisconsin—the jury found plaintiff less negligent than the defendant-manufacturer, and the trial judge (James E. Doyle) sustained the jury findings as to causal and comparative negligence and granted judgment to plaintiffs.

In *Collins* the majority of the Court of Appeals overturned the verdict and judgment thereon, grounding the decision principally upon the basis that the danger of the rotating pipe was open and obvious, that Collins was fully cognizant of the hazards of his work (App. B-A 12) and he failed to exercise ordinary care to protect himself from a danger which he should have appreciated (App. B-A 13).

Although the foregoing reasoning of the majority relied upon assumption of risk principles, Wisconsin *abolished* assumption of risk in the leading case of *McConville v. State Farm Ins. Co.*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962), written by then-Wisconsin Supreme Court Justice Fairchild.

The majority decision was so unpalatable to Judge William Campbell that, in this strong dissent, after reviewing evidence to support the jury's and trial court's findings, he commented that the majority had substituted their evaluation of the record for the jury's, and "In my opinion the result reached by the majority improperly *and inexcusably* invades the province of the jury" (App. B, A-16) (Emphasis added).

The conflict of the majority decision with prior decisions construing Wisconsin products liability laws, is irrefutable when prior decisions of the same court are considered. In *McPhee v. Corinth Machinery Co.* (7th C.C.A. decision unpublished,

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April 30, 1971, No. 18568, App. E), McPhee, a sawyer, lost both legs when he stepped on to a track ahead of a saw-carriage to dislodge the splinter from near the saw (App. E, A-20-21.) The *trial court found plaintiff causally negligent as a matter of law* in proceeding into the carriage area of the mill in the manner he did, but left to the jury the questions of negligence of the manufacturer, cause, and comparative negligence. The jury found causal negligence on the manufacturer, allocated 80% negligence to it, and 20% to plaintiff. The trial court sustained the verdict. On appeal, the Court of Appeals *affirmed*, and held that it "cannot be said as a matter of law that McPhee's causal negligence was equal to or greater than defendant's" (App. E, A-22). The reasons given by the majority *in Collins* for overturning the verdict, if applied to the facts in *McPhee*, would have resulted in *reversal* in *McPhee*. The noteworthy difference is that the Court of Appeals in McPhee did *not* exonerate the manufacturer because the danger was open and obvious to the plaintiff.

In *Sievers v. Keebler Company* (7th Cir., decision not published, Nov. 9, 1973, No. 69-C-155, reported affirmed 487 F. 2nd 1404, see App. G, H, I), plaintiff was injured in an industrial accident when his arm was caught in a machine manufactured by defendant. There was a verdict for plaintiff on comparative negligence, and the trial judge found that the findings were based upon substantial evidence, granting plaintiff judgment (App. I, A-41). The Court of Appeals, with two Wisconsin judges on the three-judge panel, *affirmed*, "adopted" the lower court decision (App. G, A-34), and, with respect to comparative negligence choice of law, cited Senior District Judge Campbell's opinion in *Elston v. Morgan*, 440 F.2nd 47, 50.

In *McPhee* and *Sievers*, as contrasted to the majority in *Collins*, the Court of Appeals did *not* exonerate the manufacturer and impose *all* the causal negligence on plaintiff upon the basis that plaintiff's familiarity with the hazard of an open and obvious danger required absolution of the manufacturer.

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The conflict created by the majority decision herein is manifest, real, and devastatingly confiscatory. The collision of *that* decision *with Wisconsin law* and prior decisions of the *same* Court of Appeals is fortified by the fact that the decisions in *McPhee* and *Sievers* involved a Wisconsin trial judge and Court of Appeals panels including Wisconsin Judges. It was considered important in *Dick v. New York Life*, 359 U.S. 437, 447 (1958) by the Supreme Court, in reversing the Court of Appeals which had overturned the jury verdict, that "after all the evidence was in, the district judge, who was intimately concerned with the trial, and who has a first hand knowledge of the applicable state principles, believed that the case should go to the jury".

3. The 7-3 vote on Petition for Rehearing In Banc, denying rehearing without opinion, did *not* resolve the conflict discussed, contrary to directives in *Wisniewski v. U.S.*, supra. What distinguishes the situation in *Collins* from that in *McPhee* or *Sievers*? Each involved a workman at his employment injured by an open and known hazard. The principles to be applied to jury verdicts and trial court judgments in all three cases should have been the same with the same result. A divided vote without opinion does not resolve the conflict. No distinction has been shown.

The failure to resolve the manifest conflict, and the irreconcilability of the majority decision herein with the prior decisions, calls for intervention of the Supreme Court to correct a manifest injustice.

II. The Majority Decision Herein Collides With and Is Incompatible With Wisconsin Law and Applicable Federal Law.

1. The decision of the court below fails to give effect to applicable decisions of Wisconsin and federal courts as to the weight to be accorded jury findings and sufficiency of evidence to support the verdict.

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The test of sufficiency of the evidence to support jury findings is substantially the same in Wisconsin as in the Seventh Circuit, viz., that where a jury verdict is attacked, the Court must consider the evidence and all inferences reasonably arising therefrom in the light most favorable to the prevailing party; and if there is any credible evidence, which, under any reasonable view, supports the jury's findings, the findings should not be set aside. ***Bruno v. Biesecker***, 40 Wis.2nd 305, 312, 177 N.W.2nd 388 (1970); ***Smith v. Uniroyal*** (7th C.C.A.1970), 420 F.2nd 438, 440; ***Dazenko v. Hunter Mach. Co.*** (7th CCA 1968), 393 F. 2nd 287; ***Sayen v. Rydzewski*** (7th C.C.A. 1967), 387 F.2nd 815.

The Statement of the Case herein and the dissenting opinion of Judge Campbell in *Collins* (App. B, A-14-16) state evidentiary facts in support of the jury findings.

2. The decision of the Court below fails to give effect to applicable decisions of Wisconsin and the Seventh Circuit Court of Appeals as to changing jury answers or granting a directed verdict.

The majority in Collins *in effect* change the answers to the jury verdict, so that the manufacturer's negligence is reduced from 65% to 0 and Collins' causal negligence is increased to 100%. In Wisconsin, the rule governing when it is proper to change a jury's answer is that *only* if the record *is devoid of evidence* that would sustain the verdict, or if the evidence is incredible, is it within the province of the trial court or the Supreme Court to substitute its view of the evidence for that of the jury. *Johnson v. Sipe*, 263 Wis. 191, 56 N.W.2nd 852 (1952); *Maichle v. Jonovic*, 69 Wis.2nd 622, 626, 230 N.W.2nd 760 (1975). The comparison of negligence is peculiarly within the jury's province. *Davis v. Skille*, 12 Wis.2nd 482, 107 N.W.2nd 458 (1961).

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In effect, the majority in *Collins* direct a verdict in favor of the manufacturer. In view of the evidence, this could *not* have been done by the trial court or the Court of Appeals under prior decisions of the Seventh Circuit. *5A, Moore's Fed.Prac. § 50.02, pp. 3320-3330.* The Seventh Circuit Rule, in diversity cases, is that *State* law controls as to when a verdict can be directed. *Etling v. Sander*, 447 F.2nd 593, 594 (1971). In Wisconsin "an issue should be taken from a jury *only* when the evidence gives rise to no dispute, or is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion." *Valiga v. Nat. Food.*, 58 Wis.2nd 232, 206 N.W. 2nd 377, 382 (1973).

The Statement of the Case and Judge Campbell's dissent include evidentiary basis compelling denial of a change of answers or direction of verdict in favor of defendant-manufacturer, rather than the result improperly accomplished by the majority.

3. The decision of the majority herein militates against applicable Wisconsin negligence and comparative negligence law in products liability cases.

The majority reversed because of Collins' knowledge of the dangers in the operation of the machine, the hazards of his work, and his failure to exercise ordinary care to protect himself from danger which he should have appreciated. *This is applying assumption of risk to completely bar the plaintiff.* That reasoning is repudiated in the decisions in *McPhee* and *Sievers*, supra, with Wisconsin judges on the appellate panels. Chief Judge Thomas Fairchild, then on the Wisconsin Supreme Court, wrote the decision in the leading case of *McConville v. State Farm Mutual*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962) which abolished assumption of risk.

In *McPhee*, supra, the same Judge Fairchild, then on the Seventh Circuit Court of Appeals, voted for affirmance of the

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verdict for the plaintiff where the latter was found negligent as a matter of law in proceeding into a known danger. In *Collins* the majority reaches a *contrary result*.

Emphatically corroborating our contention that the majority erroneously applied assumption of risk principles *in conflict with Wisconsin law* is the comment by then-Wisconsin Supreme Court Justice Fairchild in *46 Marq.L.R. 1, 5 (1962)* that "In *McConville v. State Farm*, supra, and *Colson v. Rule*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962) the Court abolished the defense of assumption of risk at least where the assumption is implied from conduct. The Court pointed out that one's unreasonable exposure of himself to a particular hazard is negligence and *subject to the comparative negligence statute*".

The disharmony of the majority with Wisconsin law is further demonstrated by the Wisconsin decisions that "conduct formerly called assumption of risk is also subject to the *same rule of comparison* as any *other* type of negligence; that *McConville* (abolishing assumption of risk) did *more* than change labels." *Bishop v. Johnson*, 36 Wis.2nd 64, 152 NW 2nd 887 (1967).

Wisconsin law following *McConville v. State Farm*, supra, said that an "obvious reason " why McConville abolished assumption of risk "was to extend the benefit of our comparative negligence statute to the plaintiff". *Dippel v. Sciano*, 37 Wis.2nd 443, 461, 155 N.W.2nd 55 (1967).

Conflictingly, the majority in *Collins* applied assumption of risk reasoning *to deprive, rather than give*, Collins the "*benefit* of our comparative negligence statute."

Further conflicting with Wisconsin law, the majority erroneously construed the "duty" of the manufacturer to depend on the facts of the injury-causing event and the conduct and experience of the plaintiff. *This is not the law of Wisconsin.* The duty

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of defendant-manufacturer in Wisconsin is *separately* prescribed by law and is the *same* as to all users of products—even non-users. *Howes v. Hansen*, 56 Wis.2nd 247, 201 N.W.2nd 825 (1972).

Insofar as the majority was concerned, the abolition of assumption of risk by *McConville* and the subjecting of such conduct to comparative negligence, as provided by *Dippel*, did *not* change Wisconsin law. The majority decision is at war with Wisconsin law.

Wisconsin law and Federal law in the Seventh Circuit required that the jury verdict and judgment of the trial court be affirmed if there was any credible evidence to support the jury's findings, and the evidence has to be construed most favorably in support of the verdict. There was such evidence. The majority of the Court did *not* construe the evidence in conformity with these rules.

If Wisconsin law had been correctly applied *in Collins*, and if Wisconsin law had been applied consistent with prior decisions of the Seventh Circuit Court of Appeals construing the same law, an affirmance of the jury verdict and judgment of the trial court was required. Petitioners are the victims of inconsistency and the misapplication of Wisconsin law by the majority.

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III. The Redetermination of Facts by the Majority, in Conflict With Applicable Wisconsin Law on Negligence and Comparative Negligence, in Conflict With Prior Decisions of the Seventh Circuit Court of Appeals Construing the Same Law, in Conflict With Wisconsin and Federal Law as to Sufficiency of Evidence to Support Jury Findings, in the Face of Supporting Credible Evidence, Without Error Committed by the Trial Court, Deprives Collins of Their Seventh Amendment Rights to a Jury Trial.

The discussions in preceding sections of this Petition support the contentions concerning the conflicts of the majority in the respects above mentioned.

The majority finds no error in admission of evidence, no error in jury instructions, no error committed by the trial court, no misconduct by the jury, but undertook a *de novo* review of the evidence and found "error in the verdict."

A reading of the majority and dissenting opinions of the three judge panel of the Court of Appeals in this case leaves no doubt but what there was substantial conflict in the evidence in this case, mostly in the form of competing expert opinions as to the safety of the product which injured the plaintiff. Although this Court has held that the Court of Appeals may enter judgment n.o.v. on behalf of a verdict loser (*Neely v. Eby Construction Co.*) 386 U.S. 317 (1967), no decision of this Court has permitted an appeals court a *lesser* standard of review of a jury verdict than that imposed on the trial court.

The majority did not disclose precisely whether it intended to apply a standard of review based upon state or federal law, but rather used terms such as "We are convinced," "Accordingly, it is our opinion," and "since we find." (App. B, A. 13-14) The trial court, on the other hand, in affirming the

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verdict applied the following standard as to the defendant motion for judgment n.o.v.:

> "For the purpose of this motion, I must determine whether the evidence along with all of the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the plaintiff, is such that reasonable persons in a fair and impartial exercise of their judgment might reach different answers to questions 1 and 2 of the special verdict . . ."
>
> (p. 1, App. A.)

It is apparent that the panel of the Court of Appeals applied a standard of review which gave *less* weight to the verdict and the evidence than that applied by the trial court.

In *A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 359 (1962) this court pointed out that:

> ". . . *neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.* For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' " (Emphasis supplied)

It is respectfully submitted that the test applied by the *trial* court in this case is a necessary "minimum" test of the sufficiency of the evidence under the Seventh Amendment. The test of the majority, couched in terms of being "convinced" or of "finding" facts from the evidence presented to the jury, is a test of a jury verdict *not* "according to the rules of the common law." The test of the majority is particularly inadequate where no error is found in the admission of evidence, jury instructions, conduct of counsel, or conduct of the jury.

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The necessity for determining a reasonable minimum standard for review of evidence in diversity cases is pointedly shown by examining what "reasonable persons in a fair and impartial exercise of their judgment" have concluded concerning the evidence in this case. Twelve properly selected, properly-instructed jurors, the trial judge, and a senior district judge found evidence to support the verdict. A district judge and an appellate court judge, viewed the evidence favorably to the defendant. On motion for rehearing, two more appellate judges joined the plaintiffs' view of the evidence, but the defendant still prevailed. The result in this case is precisely the wrong which the Seventh Amendment was intended to prevent.

If substantial and uniform deference is not accorded the verdicts of juries in error-free trials in diversity cases, then the rights accorded to litigants by the Seventh Amendment are severely eroded. These rights of Collins were demolished by the majority decision.

This Court has noted on two occasions the necessity of considering in a definitive fashion whether a state or federal standard should be applied in diversity cases in reviewing the sufficiency of evidence. *Dick v. New York Life Ins. Co.*, 79 S. Ct. 921, 359 U. S. 437, 3 L.Ed. 2d 935 (1959); *Mercer v. Theriot*, 377 U. S. 152, 156 (1964). This undecided issue could be resolved by the Court in one of at least two ways. (1) The Court could decide whether a state or federal standard should be uniformly applied, or (2) the Court could determine a standard of review which meets the requisites of the Seventh Amendment in all cases. Petitioners submit that the standard of review applied by the *District Court* in this case is a necessary minimum standard which the Court should determine must be applied in all diversity cases—whether in the name of state or federal law. In the case at bar the Court of Appeals has found *no error whatsoever on the part of the trial court* and has isolated for de-

termination the peculiar issue relating to the review of evidence in a diversity case. The review by the majority is incompatible with any permissible authority under Wisconsin Law or current law in the Seventh Circuit.

Under the circumstances of this case, the majority decision in the Court below violates Collins' Seventh Amendment rights.

CONCLUSION

Certiorari is warranted and should be granted in this case for the following reasons:

1. The decision of the Court of Appeals creates and fails to resolve substantial conflict with prior decisions of the Seventh Circuit in construing Wisconsin products liability and comparative negligence law.

2. The decision of the Court of Appeals manifestly conflicts with applicable Wisconsin products liability and comparative negligence law.

3. The decision of the Court of Appeals ignored applicable Federal standards applicable on appeal under law of the Seventh Circuit, Wisconsin law, and the Seventh Amendment.

4. The lower Court's test of the sufficiency of the evidence to support the jury verdict and judgment raises the unresolved problem of whether, in diversity cases, the state or the federal test of sufficiency of the evidence applies, and what the minimum standard of the applicable test should be.

5. In the interests of justice, and in view of applicable Wisconsin and Federal law in the Seventh Circuit, the decision of the

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Court below should not be permitted to stand, and the judgment of the trial court should ultimately be reinstated.

Respectfully submitted

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